APR 11 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1095

JERRY J. ACUFF, GARNER E. ALLEN, GEORGE J. BULLOCK, CORBETTE W. CARLISLE, C. L. CARTER, DONALD W. CARTER, GEORGE W. DEAN, DEWEY R. FAIRCLOTH, M. T. FRAZIER, A. J. GIDDENS, BOBBY HARVISON, CHARLES W. HAYS, JIMMY D. HESTER, MIKE KITTRELL, T. W. KITTRELL, PHILLIP LEE, ROBERT S. McCOY, HERBERT RAY MEITZLER, D. W. NARAMORE, WILLIAM I. PLATT, A. C. PUGH, JR., JAMES W. RICHARDSON, L. T. ROBBINS, J. I. RUSSELL, CHARLES W. SCHULER, B. R. SINGLETARY, R. C. SKIDMORE, DONALD L. WARD, J. D. WHITMAN, BOBBY N. WHITTEN, WILLIAM A. WINTERS,

Petitioners,

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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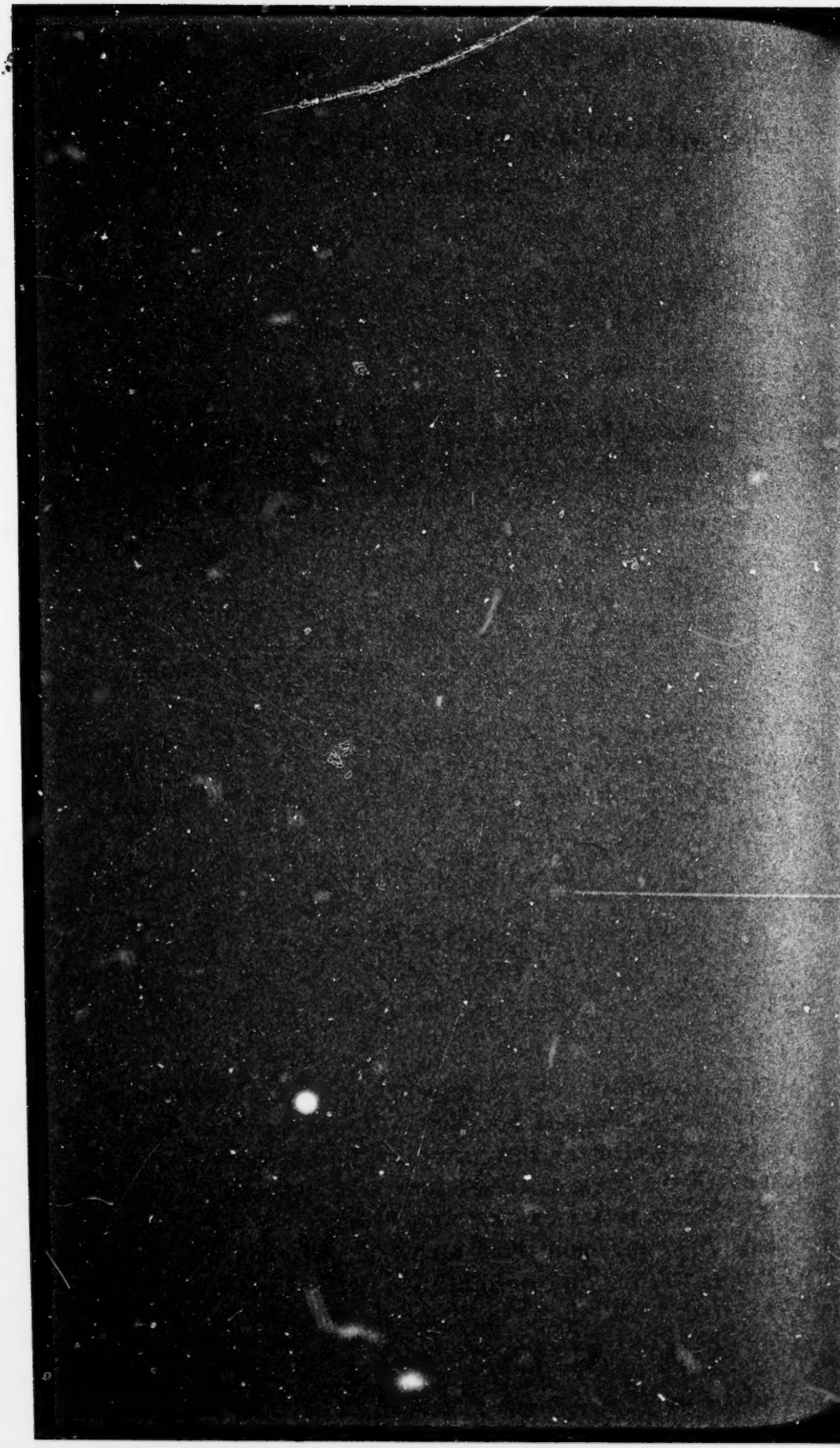
Washington, D. C. · PHONE EXECUTIVE 3-0000



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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent Scott Paper Company has, in its Brief In Opposition, conceded that jurisdiction is conferred on this Court (Scott Brief at 1), but presented the question of the timeliness of the filing of the Petition for Certiorari (Scott Brief at 2). It is argued that the Petition was filed on February 28, 1969 more than ninety days from entry of the judgment below on November 27, 1968. (Scott Brief at 13)

As shown by the affidavits filed herewith and printed in the appendix hereto, forty printed copies of the Petition for Certiorari were lodged with the office of the Clerk of this Court during regular business hours on February 25, 1969, the ninetieth day after the entry of judgment. The difficulty arose in connection with the filing of the Certified Record. This had been transmitted to the printer, Thiel Press of Washington, D.C., along with the copy for the printing of the petition and with the request that it be filed with the petition and docketing fee. (Exh. to Affidavit of Counsel, 6a) The printer however did not so deliver the record. (Affidavit of John K. Brewer, 2a)

Counsel became ill on February 24, 1969 and because of this incapacity did not make a post-filing confirmation of such details on the 25th. He had however been assured by the printer that all was in order and all deadlines as to filing and service would be met. (Affidavit of Counsel, 5a)

Respondents were not prejudiced, as service was made pursuant to this Court's rule 33 at the time of the filing. (Affidavit of John K. Brewer, 6a) The record consists only of the printed record used in the Court of Appeals for the Fifth Circuit with the addition of that court's opinion and judgment. Respondent Scott Paper Company is represented by Counsel from the same law firm as in the district court and court of appeals and therefore presumably had a copy of the printed record.

Whatever the justification for "depriving plaintiffs of their lawsuits . . . merely because their lawyers have failed to file some paper within the time required by Court rules" *Morris v. Florida*, 89 S. Ct. 84 (1968) (Black, J., dissenting), petitioners (plaintiffs below) should not be deprived of their lawsuit when the negligence is yet a step more remote—a printer's oversight. Moreover, the oversight did not prejudice respondents, and the problem probably

would not have arisen had petitioners' lawyer not been ill.[1]

See *Taglianetti v. United States*, 37 U.S.L.W. 3353 n. 1 (U.S. March 24, 1969):

> Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22(2), the time limitation is not jurisdictional, *Heflin v. United States*, 358 U.S. 415, 418, n. 7 (1959), and does not bar our exercise of discretion to consider this case.

The ninety day period provided by 28 U.S.C. 2101(c) (reproduced and cited as § 2102(c) in the Scott brief at 16) within which a "writ of certiorari . . . shall be . . . applied for . . ." may be jurisdictional,[2] but, by parity of reasoning with *Taglianetti* and *Heflin*, the provision of Supreme Court Rule 22(3)[3] requiring the filing of certified record with the petition is not jurisdictional. That is, if 28 U.S.C. § 2101(d) (delegating to the Court the authority to set the time for applying for certiorari in criminal cases) does not make

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[1] And *cf.* the practice of the office of the Clerk of this Court of not submitting forma pauperis petitions in which the United States is respondent until after the Solicitor General's brief in opposition is filed, which brief, counsel is informed, is often not filed until several weeks beyond the thirty-day period provided by Supreme Court 24(1).

[2] The inconsequential nature of the late filing of the appendix is indicated by the fact that respondent does not argue that the defect is jurisdictional.

[3] "A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law."

Rule 22(2) jurisdictional, then § 2101(c) does not make Rule 22(3)'s enumeration of documents to be filed with the petition jurisdictional.

Respectfully submitted,

REBER F. BOULT, JR.,
CHARLES MORGAN, JR.,
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

OTTO E. SIMON,
SIMON & WOOD,
1010 Van Antwerp Bldg.
Mobile, Alabama

Attorneys for Petitioner.

Of Counsel:
MELVIN L. WULF,
ELEANOR HOLMES NORTON,
156 Fifth Avenue
New York, New York 10010

APPENDIX

[Caption Omitted in Printing]

AFFIDAVIT

John K. Brewer, Production Manager of Thiel Press, Inc., Washington, D.C., after being duly sworn, deposes and says:

Following telephone conversation with Mr. Reber Boult, Atlanta, Georgia, on February 24, 1969, we dispatched messenger to pick up at Air Express Terminal, National Airport, Washington, D.C. carbon copy of draft of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above-captioned case. The petition was to be filed February 25, 1969, the following day. In the meantime, we received in our office by air mail, the original of the draft for the petition. In view of the stringent time requirements for the completion of the job, upon receipt of the air mail draft, our Master Job Sheet was prepared and the job immediately given to a compositor for composition. Subsequently, the air express package was brought by our messenger to the office. This package contained in addition to a carbon copy of the draft material for the petition, the Certified Record and a check for $100.00 payable to the Clerk of the Supreme Court to cover the filing fee, and a copy of letter of transmittal from Mr. Boult asking if we would file the Certified Record and pay the filing fee at the time we filed the Petition. The original of this letter of transmittal was enclosed with the air mail draft, but as we already had telephone instructions as to the time requirements for the filing of the job, the letter of transmittal was detached from the draft and placed aside at the time composition was undertaken. Upon receipt of the air express package the Certified Record and check were placed in a separate file for safekeeping and no entry was made on the Master Job Sheet relative to the filing of the Record and paying the filing fee.

Following the necessary composition and other work in connection with preparing the petition for printing, Press-room Instruction Sheet was prepared from the Master Job Sheet, with the consequent result that instructions to pay the filing fee and deliver the Certified Record with the petition were not given to the delivery unit. The Petition was delivered to the Office of the Clerk of the Supreme Court February 25, 1969, receipted copy of Certificate of Service being attached hereto. According to the messenger who effected delivery of the petition on February 25, no questions were raised nor was any comment made by the Office of the Clerk regarding the filing fee or the Certified Record.

To the best of my knowledge and recollection, on February 27, 1969, it came to my attention that the Certified Record and the filing fee had not been delivered with the petition. I then phoned the Office of the Clerk of the Supreme Court, telling them what had happened and advising them that I would have the filing fee and Certified Record delivered to that office. Delivery was made the following morning, February 28, 1969.

/s/ John K. Brewer

[Jurat Omitted in Printing]

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Jerry J. Acuff, Garner E. Allen, George J. Bullock, Corbette W. Carlisle, C.L. Carter, Donald W. Carter, George W. Dean, Dewey R. Faircloth, M.R. Frazier, A.J. Giddens, Bobby Harvison, Charles W. Hayes, Jimmy D. Hester, Mike Kittrell, T. W. Kittrell, Phillip Lee, Robert S. McCoy, Herbert Ray Meitzler, D.W. Naramore, William I. Platt, A.C. Pugh, Jr., James W. Richardson, L.R. Robbins, J.I. Russell, Charles W. Schuler, B.R. Singletary, R.C. Skidmore, Donald L. Ward, J.D. Whitman, Bobby N. Whitten, William A. Winters,

Petitioners,

v.

United Papermakers and Paperworkers, AFL-CIO/International Brotherhood of Pulp, Sulphite and Papermill Workers, AFL-CIO; and Scott Paper Company, Southern Division,

Respondents.

RECEIVED
FEB 25 1969
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. _____

CERTIFICATE OF SERVICE

I certify that today February 25, 1969, I delivered (mailed) in the quantities itemized, copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above-entitled case to the following counsel of record:

3 Copies: (AIRMAIL)
Marshall J. Demouy and John Grow
Armbrecht, Jackson and Demouy
1011 Merchants National Bank Building
Mobile, Alabama 33601

3 Copies: (AIRMAIL)
Willis C. Darby, Jr.
P.O. Box 2565
Mobile, Alabama 33601

3 Copies: (AIRMAIL)
Otto E. Simon
Simon & Wood
1010 Van Antwerp Building
Mobile, Alabama

3 Copies: (AIRMAIL)
Melvin L. Wulf
156 Fifth Avenue
New York, New York

Thiel Press
1422 K Street, N.W.
Washington, D.C. 20005

By _____

Sworn to before me this _____ day of _____ —

_____

_____

[Caption omitted in printing]

AFFIDAVIT OF COUNSEL

Reber F. Boult, Jr., after being duly sworn, deposes and says, as the counsel primarily responsible for preparation, printing, and filing of the petition for certiorari herein:

Charles Morgan, Jr. and I, having first been contacted by two of the petitioners, agreed on February 14, 1969 to prosecute this case in the Supreme Court. Mr. Morgan assigned to me, the obtaining and filing of the certified record, a major portion of the preparation of the petition and responsibility for the printing and filing thereof.

I thereupon instructed counsel below to arrange to have the certified record transmitted directly from the Clerk of the Court of Appeals for the Fifth Circuit to the Clerk of the United States Supreme Court. However in a telephone conversation with the Fifth Circuit Clerk's office on

another subject during the week prior to the filing deadline herein, the transmittal of the record in this case was mentioned. That office indicated a preference for sending the record to me for transmission with the petition; this was done.

Attached as an Exhibit hereto is a copy of my letter of transmittal of February 22, 1969 for the printer's copy, docketing fee, and certified record. This letter requests that the printer, Thiel Press, file the docketing fee and record with the printed petition.

On Monday, February 24, 1969 I became ill, but before leaving our office during the afternoon, I confirmed by telephone with the printer that the copy had been received and that all deadlines as to filing and service would be met. I probably would have again the next day explicitly confirmed that all such requirements had been met, but because of the continuing illness did not do so.

/s/ Reber F. Boult

[Jurat omitted in printing]

EXHIBIT TO AFFIDAVIT OF COUNSEL

The Roger Baldwin Foundation
of ACLU, Inc.

SOUTHERN REGIONAL OFFICE

5 FORSYTH STREET, NW
ATLANTA, GEORGIA 30303
(404) 524-0386

Charles Morgan, Jr.
Director

Reber F. Boult, Jr.
Staff Counsel

22 February 1969

Thiel Press
1422 "K" Street, N.W.
Washington, D.C.

RE: Acuff v. National Papermakers

Dear Mr. Thiel:

We are enclosing the copy for the petition for certiorari in this case. Please print 150 copies with white covers.

The original of the petition and the remaining portion of the appendix are enclosed herewith; a copy of the petition (without the appendix for which other arrangements can be made if the original does not arrive) and a copy of this letter are being air-expressed for delivery to your office.

The deadline for filing is Tuesday, February 25th, 1969. Please file the customary forty copies and distribute the remaining as follows:

3 copies to be served upon opposing counsel
Marshall J. DeMouy and John Grow
Armbrecht, Jackson and DeMouy
1011 Merchants National Bank Building
Mobile, Alabama 33601

3 copies to be served upon opposing counsel
Willis C. Darby, Jr.
P.O. Box 2565
Mobile, Alabama 36601

3 copies to Otto E. Simon
Simon & Wood
1010 Van Antwerp Building
Mobile, Alabama

70 copies to Melvin L. Wulf
156 – 5th Avenue
New York, New York

The remaining copies are to be sent to this office.

Since it is most certain that it will arrive by Tuesday, I am enclosing our check for the one-hundred dollar docketing fee made out to John F. Davis, Clerk, with the air-express copy as well as the certified record. We would appreciate it if you would file these with the petition. Also, please execute your usual affidavit of service for the copies that you will air mail to opposing counsel.

I will be in touch with you Monday morning by telephone to make arrangements for reading the proofs and to insure that all is in order.

Very truly yours,

/s/ Reber Boult, Jr.